United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 06-967**
	)	**Issued: January 5, 2007**
U.S. POSTAL SERVICE, MIAMI PROCESSING & DISTRIBUTION CENTER, Miami, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 16, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' September 8, 2005 decision which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the most recent merit decision of September 26, 2002 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of the merits on the grounds that it was not timely filed in accordance with section 8128(a) and did not establish clear evidence of error.

FACTUAL HISTORY

On June 7, 1989 appellant, then a 42-year-old letter sorting machine clerk, filed a traumatic injury claim alleging that she injured her back in the performance of duty. The Office initially accepted appellant's claim for lumbar strain and later accepted a herniated disc at L4-5. By decision dated December 7, 1998, the Office terminated appellant's compensation benefits on the grounds that she abandoned suitable work. The Office determined that appellant was capable of performing full-time light-duty work. Appellant disagreed with this decision and alleged that she attempted to return to work but was sent home by her supervisors. The Branch of Hearings and Review affirmed the decision on October 13, 1999. The Office reviewed appellant's claim on the merits and denied modification of the December 7, 1998 decision on December 10, 1999, June 27, 2000, June 13 and September 26, 2002.

Appellant requested reconsideration on July 23, 2005 and submitted additional medical evidence and argument in support of her claim. She alleged that she reported to work on November 2, 1998, but that the employing establishment had no work available for her. Appellant stated that her supervisor and the tour administrator sent her home.

Appellant also submitted medical reports dated November 22, 2002 through April 23, 2003 from her current attending physician, Dr. Christopher Vendreyes, a Board-certified anesthesiologist, who noted appellant's complaints of pain, history of back injury and positive discogram at L4-5. He recommended an IDET procedure. Appellant refused and Dr. Vendreyes declined to prescribe more narcotics, terminating treatment.

Appellant also submitted medical reports dated December 16, 1998 to November 18, 2004 from a variety of physicians. On September 11, 1992 Dr. William L. Bacon, a Board-certified orthopedic surgeon, reported that appellant was unable to stand for lengthy periods of time due to her back surgery. Dr. Robert E. Jacobson, a neurosurgeon, completed a report on August 15, 1995 and stated that appellant was totally disabled. On September 24, 1996 he stated that appellant had improvement of her pain on August 22, 1996 following a facet rhizotomy. Dr. Jacobson recommended a repeat procedure and then a detailed evaluation to determine if appellant could return to a full-time light-duty position. Appellant submitted a form report dated December 16, 1998 which found that she was totally disabled for work. The signature on this report is illegible. The physician indicated that he first examined appellant on December 16, 1998 and found that she could perform light duty. Dr. Valentine A. Duruibe, a physician, reported on January 20, 2002 that appellant was unable to work for the previous year. On March 18, 2002 appellant underwent a lumbar discogram which demonstrated discogenic pain at L4-5. Dr. Gaetano J. Scuderi, a Board-certified orthopedic surgeon, examined appellant on April 4, 2002 and stated that she was currently capable of light-duty work with no frequent standing or prolonged walking. Dr. Andrew G. Frank, a specialist in rehabilitation medicine, examined appellant on November 5, 2004, but did not address appellant's ability to work. In a report dated November 18, 2004, Dr. I. Jack Miller, an orthopedic surgeon, noted appellant's complaints of back pain. He did not discuss her ability to work at any time.

By decision dated September 8, 2005, the Office denied appellant's request for reconsideration, finding that it was not timely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

The Office's regulations require that an application for reconsideration must be submitted in writing[6] and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."[7] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."[8]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

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[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews,* 44 ECAB 765, 768 (1993).

[3] *Id.* at 768; *see also Jesus D. Sanchez,* 41 ECAB 964, 966 (1990).

[4] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied,* 41 ECAB 458 (1990).

[5] 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 2 at 769; *Jesus D. Sanchez, supra* note 3 at 967.

[6] 20 C.F.R. § 10.606.

[7] 20 C.F.R. § 10.605.

[8] 20 C.F.R. § 10.607(b).

[9] *Thankamma Mathews, supra* note 2 at 770.

[10] *Id*.

[11] *Leona N. Travis,* 43 ECAB 227, 241 (1991).

clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[14] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[15] The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that it abused its discretion in denying merit review in the face of such evidence.[16]

ANALYSIS

The Office terminated appellant's compensation benefits on the grounds that she abandoned suitable work after such work had been secured for her. In order to present clear evidence of error on the part of the Office in this decision, appellant must submit legal arguments and evidence which is not only relevant to the reason her benefits were terminated but is sufficient to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[17]

Appellant's argument that she attempted to return to work, but was not allowed to work, is relevant to the issue of whether the Office properly terminated her compensation benefits. However, appellant has not submitted any factual evidence in support of this contention. Moreover, this allegation was previously raised and considered by the Office. It is not sufficient to require the Office to reopen her claim.[18]

The medical evidence submitted by appellant is also insufficient to require the Office to reopen her claim for further review of the merits. She did not submit any medical evidence addressing the central issue in the claim, whether at the time of the Office's December 7, 1998 suitable work determination, she was in fact capable of performing the full-time light-duty work position found suitable by the Office. While Dr. Bacon, a Board-certified orthopedic surgeon, stated that appellant could not stand for long periods of time in 1992, this does not address her ability to work in 1998. Dr. Jacobson, a neurosurgeon, found appellant totally disabled on

[12] *Jesus D. Sanchez, supra* note 3 at 968.

[13] *Leona N. Travis, supra* note 11.

[14] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[16] *Gregory Griffin, supra* note 4.

[17] *Leon D. Faidley, Jr., supra* note 15.

[18] The Board also notes that appellant previously made this argument before the Office and the Office addressed this claim in its December 7, 1998 decision.

April 15, 1995. This report also predates the Office's finding that appellant was capable of light-duty work and cannot establish clear evidence of error on the part of the Office. Furthermore, Dr. Jacobson's September 24, 1996 report indicated that he felt appellant might be capable of full-time light duty at some point in the future.

The only report within the time frame of the Office's December 7, 1998 decision is the December 16, 1998 form report which indicated that appellant was totally disabled and also capable of performing light duty on that date. This report is not sufficient to establish clear evidence of error. The form report is not sufficiently detailed or rationalized to establish that appellant could not perform the suitable work procured for her and is internally inconsistent on the issue of her disability for work. This report does not raise a substantial question as to the correctness of the Office's decision. It does not establish clear evidence of error.

CONCLUSION

The Board finds that appellant has not submitted clear evidence of error on the part of the Office in terminating her compensation benefits by decision dated December 7, 1998.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board